BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JESSICA D. RICHSTATTER f/k/a	)	
JESSICA D. FARMER	)	
Claimant	)	
VS.	)	
	)	Docket No. 250,900
CITY OF INDEPENDENCE	)	
Respondent	)	
AND	)	
	)	
KANSAS MUNICIPAL INSURANCE TRUST	)	
Insurance Trust	)	

ORDER

Respondent and its insurance trust appealed the July 28, 2006, Award entered by Special Administrative Law Judge Marvin Appling. The Workers Compensation Board heard oral argument on January 19, 2007, in Wichita, Kansas.

APPEARANCES

Jim Lawing of Wichita, Kansas, appeared for claimant. Jeffery R. Brewer of Wichita, Kansas, appeared for respondent and its insurance trust.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument before the Board, the parties also stipulated claimant sustained an 8.5 percent whole person functional impairment as a result of the low back injury she sustained working for respondent. The parties also agreed any medical reports that were generated as a result of a Judge's order for an independent medical evaluation were to be considered part of the evidentiary record for purposes of this appeal. Accordingly, the May 17, 2001, and April 19, 2000, medical reports of Dr. Philip R. Mills and the June 14, 2005, and July 26, 2002, medical reports of Dr. Paul S. Stein are part of the evidentiary record.

ISSUES

Claimant injured her low back on September 30, 1999, while working for respondent. In the July 28, 2006 Award, Judge Appling found claimant had a 72.5 percent permanent partial general disability, which was based upon a 45 percent task loss and a 100 percent wage loss. Accordingly, the Judge awarded claimant benefits under K.S.A. 44-510e for a 72.5 percent permanent partial general disability.

Respondent and its insurance trust contend Judge Appling erred. They argue claimant did not prove her task loss and, therefore, her task loss should be considered to be zero percent in the formula for determining permanent partial general disability. They also argue a wage loss of 30 percent should be imputed as claimant has failed to make a good faith effort to look for other employment. Consequently, respondent and its insurance trust request the Board to decrease claimant's permanent partial general disability to no greater than 15 percent.

Conversely, claimant contends the Award should be affirmed.

The only issue before the Board on this appeal is the nature and extent of claimant's disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified.

On September 30, 1999, claimant was working as a paramedic for the City of Independence when she injured her low back while lifting a heavy person who was having a heart attack. That accidental injury arose out of and in the course of claimant's employment with the city.

Claimant reported her back injury to respondent and eventually received authorized medical treatment from Dr. Empson, Dr. Paul S. Stein and Dr. Kevin Komes. Claimant also sought treatment on her own from Dr. Mohammed S. Shakil. The treatment claimant received from the various physicians included diagnostic studies, physical therapy, medication and injection at the sacroiliac joint.

Claimant was off work after her back injury until mid or late December 1999, at which time respondent assigned claimant light duty work. She performed the light duty work for approximately one month until respondent informed claimant she either had to return to full duty work, take leave or be terminated as she had been released to work full

duty by Dr. Komes on January 18, 2000. But claimant also had restrictions from Dr. Shakil to remain on light duty. In short, claimant did not attempt to return to full duty and, therefore, she has not worked for respondent since the first part of February 2000.

Over the course of this claim, claimant sought additional treatment and evaluation by means of an order from the Division of Workers Compensation but she was denied. In addition, claimant sought out and received unauthorized medical treatment, including Dr. Shakil's services and a discogram performed by Dr. Donald White.

In June 2000, after having left respondent's employ, claimant worked part time for approximately three or four weeks at a chiropractic clinic in Coffeyville. Claimant discontinued working there as she experienced pain when walking patients to and from the waiting and treating areas.

Despite not working since January or February 2000 (except for the short stint at the chiropractic clinic), claimant testified her condition has worsened. Claimant walks with a limp. And she is receiving Social Security disability benefits. Claimant testified at her July 2005 regular hearing that she last filled out an application for employment around 2000.

Dr. Philip R. Mills evaluated claimant on two occasions at the request of the administrative law judge. In the doctor's April 19, 2000, report following the initial evaluation, Dr. Mills diagnosed mechanical low back pain and rated claimant as having a five percent whole person functional impairment as measured by the AMA *Guides*[1] (4th ed.). The doctor did not believe any further treatment was required but he encouraged claimant to be on a walking and/or swimming program.

At the time of the second evaluation on May 17, 2001, Dr. Mills diagnosed chronic pain syndrome, sacroiliac irritation, underlying mechanical low back pain and depression. The doctor encouraged claimant to stay as active as she could with home treatment modalities, stretching, heat, ice, and walking and/or swimming.

On September 27, 2002, Dr. Peter V. Bieri saw claimant at her attorney's request. Dr. Bieri opined claimant's low back injury was consistent with a chronic lumbar strain and that claimant had developed a marked gait abnormality secondary to pain. The doctor rated her whole person functional impairment under the AMA *Guides* (4th ed.) as being 12 percent (five percent for specific disorders of the lumbar spine region and seven percent for range of motion deficits of the lumbar spine) using the Range of Motion Model. Dr. Bieri

[1] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

further opined that other than prescription medication as needed for pain relief, no other specific treatment in the future was anticipated.

In addition to providing claimant medical treatment several weeks after her injury, Dr. Paul S. Stein evaluated claimant on two occasions for independent medical examinations requested by the administrative law judge. These two examinations took place on July 26, 2002, and June 14, 2005. Indicating that the rating he was providing in June 2005 was based on complaints or symptomatology rather than objective findings, Dr. Stein rated claimant's whole person functional impairment between zero and five percent using the DRE (Diagnosis-Related Estimates) Model. The doctor indicated, however, that using the Range of Motion Model as a differentiator would place claimant's impairment at five percent.

The medical evidence is uncontradicted that claimant sustained a permanent injury to her back as a result of her September 1999 accident. The evidence is also overwhelming that she should refrain from certain types of work and she should observe certain work restrictions and limitations. Dr. Mills concluded claimant should use good body mechanics, which means she should lift close to her body, avoid a bend/twist movement, and only lift bulky (even light) objects with the help of another person.

Dr. Stein, on the other hand, recommended no repetitive bending or twisting of the lower back; no lifting more than 30 pounds in any single lift nor more than 20 pounds occasionally; no lifting from below knuckle height more than twice in a single workday; and that she alternate sitting, standing and walking.

Finally, Dr. Bieri determined claimant should generally limit her work activities to the light physical demand level. This would limit occasional lifting to 20 pounds, frequent lifting no greater than 10 pounds, and negligible constant lifting. In addition, sustained ambulation on level surfaces should be limited to no more than one hour at a time, with 15 minutes for postural adjustment. Stooping and bending should be performed no more than occasionally. And Dr. Bieri believed crawling and squatting would be precluded.

Low back injuries are not addressed in the schedules of K.S.A. 44-510d. Consequently, K.S.A. 44-510e governs the computation of claimant's permanent disability benefits. The record establishes that claimant has lost the ability to work as a paramedic. But claimant's permanent partial general disability is not measured by whether she is able or unable to perform that job. Instead, claimant's permanent partial general disability is measured by averaging claimant's wage loss with her task loss. And that task loss, ***which must be in the opinion of a physician***, is based upon the work tasks she performed in any substantial gainful employment during the 15-year period before the accident. K.S.A. 44-510e reads, in pertinent part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

Claimant's labor market expert, Jerry D. Hardin, evaluated claimant's work history and determined claimant had 76 work tasks she performed in the 15 years before her accident. But 31 of those tasks were duplicates. According to Mr. Hardin, claimant lost 22 of the 45 non-duplicate tasks, or 49 percent, due to her September 1999 accident and her resulting work restrictions.

But no evidence was presented that a doctor reviewed Mr. Hardin's work task list or his analysis of task loss. Consequently, the record lacks a physician's opinion regarding the number of former work tasks claimant lost due to her September 1999 low back injury. Therefore, claimant has no task loss for purposes of computing her permanent partial general disability.

In determining wage loss under the permanent disability formula set forth in K.S.A. 44-510e, *Foulk*[2] and *Copeland*[3] must be considered. In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon

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[2] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[3] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

the ability to earn wages rather than the actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[4]

The Kansas Court of Appeals in *Watson*[5] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[6]

The medical evidence is overwhelming that claimant is limited to light work activities. And although claimant is receiving Social Security disability benefits, there is no expert medical opinion in the record that suggests claimant should not work. Considering claimant's limited efforts to find other employment, the Board concludes claimant has failed to prove she has made a good faith effort to find appropriate light duty work. Consequently, claimant's post-injury wage should be imputed based upon claimant's retained ability to earn wages.

Mr. Hardin believes claimant could earn approximately $240 per week in the area of Southeast Kansas where she lives and worked. But respondent's vocational expert, Brenda Umholtz, believes claimant could earn approximately $300 per week. The Board is not persuaded that either opinion is more accurate than the other. Accordingly, the Board averages those estimates and finds that claimant retains the ability to earn $270 per week, which creates a 48 percent wage loss for the permanent partial general disability formula.

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[4] *Id.* at 320.

[5] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[6] *Id.* at Syl. ¶ 4.

Averaging claimant's zero percent task loss with her 48 percent wage loss yields a 24 percent permanent partial general disability. Consequently, the July 28, 2006, Award should be modified.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[7] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the July 28, 2006, Award entered by Judge Appling.

Jessica D. Richstatter, formerly known as Jessica D. Farmer, is granted compensation from the City of Independence and its insurance trust for a September 30, 1999, accident and resulting disability. Based upon an average weekly wage of $514.92, Ms. Richstatter is entitled to receive the following disability benefits:

Ms. Richstatter is entitled to receive 11 weeks of temporary total disability benefits at $343.30 per week, or $3,776.30.

For the period from December 17, 1999, through January 31, 2000, Ms. Richstatter is entitled to receive 6.57 weeks of permanent partial general disability benefits at $343.30 per week, or $2,255.48, for an 8.5 percent permanent partial general disability.

For the period commencing February 1, 2000, Ms. Richstatter is entitled to receive 93.03 weeks of permanent partial general disability benefits at $343.30 per week, or $31,937.20, for a 24 percent permanent partial general disability.

The total award is $37,968.98, which is all due and owing less any amounts previously paid.

The record does not contain a written fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

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[7] K.S.A. 2006 Supp. 44-555c(k).

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of February, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jim Lawing, Attorney for Claimant
Jeffery R. Brewer, Attorney for Respondent and its Insurance Trust
Thomas Klein, Administrative Law Judge
Marvin Appling, Special Administrative Law Judge